United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6150

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

LOCAL 14, INTERNATIONAL UNION OF OPERATING ENGINEERS; LOCAL 15, INTERNATIONAL UNION OF OPERATING ENGINEERS, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS (Cont'd) PAGE

TABLE OF AUTHORITIES

CASES:

*Herein, "Sheet Metal Workers, Local 28"

TABLE OF AUTHORITIES (Cont'd) PAGE

TABLE OF AUTHORITIES (Cont'd) PAGE

**Herein, "Steamfitters, Local 638"

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TABLE OF AUTHORITIES (Cont'd)

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ISSUES PRESENTED

1. Whether the evidence supports the district court's finding that the union-appellants had engaged in a pattern and practice of discrimination against minorities, in violation of Title VII, by their recruitment, training, membership and work referral practices.

2. Whether the relief ordered by the district court was appropriate to redress the violations found.

3. Whether the General Contractors Association (GCA), which negotiates and enters into collective bargaining agreements on behalf of its members, was properly joined as a defendant for purposes of relief only, under Rule 19(a), F.R.Civ.P.

4. Whether the decree was properly entered in relation to GCA, after GCA was given an opportunity to be heard concerning the proposed relief.

STATEMENT OF THE CASE

This appeal is from a final judgment and injunctive order entered on September 1, 1976, by the United States District Court for the Southern District of New York (Judge Charles H. Tenney) in an action initially brought by the United States [1/] in 1972 pursuant to Section 707 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-6, against Locals 14 and 15 of the International Union of Operating Engineers (hereafter, Local 14 or 15, or the union), and ten contractors associations with which the locals have collective bargaining agreements. (App.I 7-15) The contractors associations--including the General Contractors Association of New York (hereafter, GCA) and Allied Building Metal Industries--were joined as parties defendant under Rule 19(a), F.R.Civ.P., for the purposes of relief only. (App.I 11-12)

The complaint alleged that the locals (Local 14 and its affiliate, 14B; Local 15 and its subdivisions 15A, 15B, 15C and 15D) had engaged in a pattern and practice of discrimination against nonwhite and Spanish surnamed (hereafter, minority) workers. (App.I 10-11) After an extended trial, the district court ruled that both locals' practices as to recruitment and training, admission to union membership,

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1/ Prior to trial, the Equal Employment Opportunity Commission was substituted as party plaintiff, in accordance with the 1972 amendments to Title VII, 42 U.S.C. §2000e-6(c) (Supp. V 1975). (App.I. 125)

and work referral, deprived minority workers of equal employment opportunities, in violation of Title VII. (App.I 104-21)

On September 1, 1976, after considering proposed orders and comments thereon by the government, the locals and GCA (App.I 204-38), and after argument (App.I 128-203), the district court entered a comprehensive order designed to correct the discriminatory practices and to make whole the victims of the discrimination. (App.I 239-71)

This Court denied a stay pending appeal of the order on October 28, 1976.

STATEMENT OF FACTS

A. Jurisdiction of the locals

Locals 14 and 15 are both operating engineers locals with the same geographic jurisdiction (New York City) and similar trade jurisdictions (building and heavy construction work).[2/]

2/ Local 14 covers building work, including the operation of most hoisting equipment, and heavy construction work, including digging building foundations and driving piles on foundations, and building docks, bridges, sewers, tunnels and roads. Hoisting steel comprises a very small percentage of the work performed by Local 14. (Tr. 413-14) Local 14B, which has a separate charter, covers the operation of hoisting equipment in private scrapyards and brickyards, some well-digging, and stevedoring on the New York waterfront. (App.I 75-76; Tr. 388-89, 403)

Local 15 covers the operation and maintenance of equipment for building and heavy construction sites, and related work, including welding and surveying. It has five branches: 15 and 15A cover operating engineers, maintenance engineers, welders on construction sites, and relatively unskilled oilers, helpers and maintenance personnel;

(Footnote Continued)

(App.I 75-76; Tr. 20-24, 388-89) [3] The two locals generally do the same work, although the equipment operated by the two locals differs somewhat. (App.I 126; Tr. 27, 47) Local 14 men operate, for example, large hoisting equipment (cranes and derricks) not operated by Local 15 men. Among the types of equipment operated by both locals, the Local 14 equipment is generally larger or used in a different work area. (App.I 78-79, 126; App.II 189-92; Tr. 111-112, 326, 397-401) In fact, New York City is the only place in the country where there are two operating engineers locals; elsewhere, all the equipment and work is within the jurisdiction of one operating engineers local. [4] (App.I 77, 126; Tr. 47, 480; PX 5D at 35-39)

2/ Footnote Continued

15B covers maintenance workers at the Port Authority of New York and various race tracks; 15C covers maintenance engineers (i.e., mechanics) for construction equipment who work in indoors repair shops; 15D covers surveying work on construction sites. (App.I 76-77; Tr. 20-24, 55, 66-67)

3/ Citations are generally first to the district court's findings of fact (App.I 72-127), followed by representative record references which support the district court's findings.

App.I refers to Volume I of the Joint Appendix, containing the pleadings; App.II refers to Volume II of the Joint Appendix, containing exhibits introduced at trial; Tr. refers to the transcript of the trial; and PX and DX refer to Plaintiff's Exhibits and Defendants' Exhibits, respectively, which do not appear in the Joint Appendix.

4/ For the reasons behind the chartering of two separate locals in 1937, see App.I 78; Tr. 46-47.

GCA has collective bargaining agreements on behalf of its employer members with Locals 14, 15, 15A, 15C and 15D.[5/] (App.II 517) The employer-members of GCA do not have separate collective bargaining agreements with the locals, nor do they separately sign the agreements negotiated by GCA. Rather, they authorize GCA to negotiate and to sign the agreements on their behalf. (App.II 517; Tr. 668, 672, 676) The employer-members on whose behalf GCA bargains and signs are always listed either at the end of the agreement or as an appendix to it (E.g., App.II 147-48, 206, 287, 298, 434) Allied Building Metal Industries, Inc. has similar collective bargaining agreements, entered into on behalf of its members, with Locals 14 and 15. (App.II 210-59)

Locals 14 and 15 effectively control the work opportunities within their jurisdictions. Their collective bargaining agreements cover at least 95% of the persons working in their respective jurisdictions. (App.I 82; Tr. 25) Although the collective bargaining agreements no longer provide for the hiring of only union members, as they did until the 1940's (App.I 82; Tr. 59), the union security clauses of the agreements provided that any employee must become a

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5/ GCA's collective bargaining agreements appear at App.II 121-206, 278-325, 347-434.

union member within a specified number of days as a condition of employment. (App.II 184, 301, 340) And although the agreements do not prohibit the employers from hiring nonunion men without going through the unions' hiring hall, in reality, the contractors rarely, if ever, hire nonunion men "off the street." In accordance with their understanding of the unions' position,[6/] they tell all such applicants that they must go to the union hall to be referred for work. (Tr. 633-34, 655, 659, 664-65) When contractors do hire on their own, rather than through the hiring hall, they call previous employees, who are all union men. (Tr. 669, 676, 787, 789)

B. Exclusion of Minorities

1. The statistical evidence

The membership of both locals has been almost exclusively all white up to the time of trial. (App.I 83, 104;

6/ It is customary for members of both unions to "challenge" persons they do not know to make sure they have a union book. (Tr. 286-87, 554, 951-53, 3175-76) In fact, Local 14's By-Laws make it a duty of its members to "determine whether or not others on a job doing work within the jurisdiction of the International Union are members in good standing." (App.II 85) If the challenged person does not have a book, the business agent is notified; the business agent will approve the man if he was referred by the union, but nonunion workers not referred may be displaced. (Tr. 952-53)

While most union officials stated the sole purpose of the challenge practice was to satisfy their curiosity, Business Agent Messinger testified the purpose was to remind contractors of their obligation to secure union people for the job. (Tr. 554, 3175-76)

Tr. 57-59) As of September 1, 1974, only 44--or 2.8%--of Local 14's total membership of 1,555 were minorities. (App.I 85; Tr. 379, 1667) Local 14-B, with 157 of the 1,555 members, had nearly half (20) of the 44 minorities. (Id.) Local 15, as of that date, had 6,362 members of whom 6.5% were minorities. (App.I 83-84; PX 98,99) Of the 415 minority members of Local 15 in September 1974, nearly one-third (31.1%) had been admitted to the union since the commencement of this lawsuit. (Id.)

In comparison, 36.39% of the relevant labor pool--the New York City male labor force 16 years of age and over, with a high school education or less--is black or Spanish-surnamed.[7/] (App.I 85-86; A.II 33)

2. Union practices: Local 15

a. Local 15 maintained no consistent or objective criteria for approving applicants for membership. (App.I 81, 92; Compare testimony of various Local 15 union officers and business agents at Tr. 78, 118-22, 277-85, 323-24, and 363-64) Prior to 1971, there was no system for testing the qualifications of persons desiring membership. Rather, white nonunion persons usually gained membership in the union by

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7/ For a full explanation of the manner in which these statistics were complied, see App.II 32-42, Tr. 201-222. Neither local requires a high school education for admission, and the union members generally have no more than a high school education. (App.I 85 and record references cited therein). Only a handful (approximately 180) of Local 15's more than 6,000 members (all 15C men) work outside the five counties of New York City. (App.I 125; Tr 351, 374)

getting a job through the local's hiring hall, receiving informal on-the-job training from union members, performing the job to the satisfaction of the employing contractor, on one piece of equipment or as a non-operator, and being brought into the union under the collective bargaining agreement union security clauses requiring new employees to join the union after seven days on the job (thirty days, if 15C).[8/] (App.I 92, 95; Tr. 78, 120-22, 243, 343, 363-64; App.II 184, 208, 225, 245, 313, 337, 340, 398)

Obtaining the requisite job referrals and informal on-the-job training--whether as an operator, maintenance engineer oiler, mechanic, or surveyor--depended heavily on having relatives or friends in the union. (App.I 86-87, 93; App.II 93, 94, 95, 96; Tr. 134-35, 136, 158, 230, 244-45, 255, 291, 341, 360-61, 365-66, 875-77, 1350-51, 1373-74, 3174, 3635)

On-the-job training was, historically, virtually the sole source for learning the trade. Local 15 has never operated a formal apprenticeship program (App.I 91; App.II 118; Tr. 146, 155) Until December 1970, it offered no form of

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8/ In addition, members of non-operator branches of Local 15, who wished to transfer to Local 15, were referred to a job without testing their operator qualifications, and were given an opportunity to demonstrate their skill on the job. (App.II 119) Men from other operating engineers locals were automatically admitted without testing. (Tr. 3188)

training other than the informal on-the-job training usually provided by friends and relatives who were union members.[9] (App.II 93, 94, 95; and supra at 9)

After instituting a small training facility[10] in December 1970, Local 15 began referring minority persons seeking work from or membership in Local 15 to the school where they are required to demonstrate proficiency on at least three pieces of equipment available at the school. (App.I 87, 92-93; Tr. 106, 120, 288, 315, 3122-24, 3132, 3172, 3589)

If unable to pass the test, the minorities were required to attend the school on Saturdays until they were able to pass the test, at which time they could be admitted to the union (receive a union book). (App.I 87; Tr. 315-19, 3127, 3144, 3587, 3700-01) Local 15 did not issue books to minorities attending the school until they graduated, even where they had meanwhile been satisfactorily working on permit for more than the union security clause period. (App.I 96; Tr. 1086-89, 1146, 1148-49, 1402, 1412, 1413, 1454-59, 1504-5, 1508-15,

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9/ For operating equipment, Local 15 operators taught newcomers, working Local 15's many non-operator jobs, how to operate the equipment before and after work hours, during the lunch period and slack periods during the day. Shop mechanics, starting as unskilled helpers, were taught by Local 15 mechanics. Surveyors, starting as unskilled rodmen, were taught by Local 15 transit men and party chiefs. (App.II 103-4, 106; Tr. 53-55, 82, 83, 131-35, 308, 311, 356-57)

10/ The training facility has room for only 50-55 men at one time, graduated 17 men in 1972, 30 in 1973, and 6 in the early part of 1974. Of these men only about 15 were nonunion minorities. (App.I 88; Tr. 3191; DX G) The school has only a small sample of the equipment actually operated by Local 15 men on the job. See infra at 12.

3623-24,* 3630-31,* 3684*) In other instances as well, minorities qualified for union membership had to wait longer than whites to recieve their book. (App.I 96; Tr. 945-55; 1239, 1242-49; 3232-33;* 3275;* 3304;* 3321-22;* 3676-78*)

Local 15 refused to accept the experience and qualifications of many minority persons who had completed other training programs more effective than Local 15's training program[11/] or who had extensive prior private experience outside New York (usually in Latin America or the West Indies), even though it referred and admitted to the union less qualified or less experienced whites without such training. (App.I 86, 88-89, 96; Tr. 134-35; 247; 790-96, 799-803; 827-33, 838-40; 852-53; 934-43, 946; 1379-1403, 1409-13; 1440-51, 1484-85; 1494-99, 1503-04, 1508-23; 3045-48,* 3056-57,* 3059;* 3428-29,* 3434-36,* 3438;* PX 67, 68, 71, 82)

This new testing and training requirement, which was a significant increase in admission standards, has been applied almost exclusively to minorities. Most whites have not been tested but continue to become union members by the traditional

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*Those portions of the transcript followed by an asterisk above refer to testimony of minority witnesses called by Local 15.

11/ The two major training programs are the Job Corps program sponsored and taught by the International Union of Operating Engineers, and the United States Army Corps of Engineers training program. The district court's reasons for finding these programs more effective training vehicles than the unstructured Local 15 training school, outlined at App.I 89, are fully supported by the evidence. For a description of the IOUE-Job Corps training program, see PX 93, 95, and testimony of minority grad-

(footnote continued on next page)

a prima facie case of a pattern and practice of discrimina-

means, i.e., by obtaining a job and informal training through friends and relatives in the union and performing satisfactorily on the job on one piece of equipment or as a non-operater.[12/] (App.I 87, 95-96; Tr. 120, 322-24 and supra at 9)

The court found the new testing and hiring requirement to be deficient in several respects. (App.I 92-95) It is irrelevant to the many available non-operator jobs, e.g., maintenance engineers, oilers, surveyors. (App.I 92-93; App.II 192-93; Tr. 292-93, 294, 316, 3134, 3140) It is administered only on the limited equipment available at the school and not on the many other major pieces of equipment actually used on the job. It therefore does not even determine a man's ability to operate three pieces of Local 15 equipment. (App.I 94; App.II 191-92; Tr. 312-13, 314, 325-26, 1170, 1429, 1431, 3150) Proficiency is required on three pieces of the school's equipment even though many men specialized on one type of machinery

11/ (footnote continued)
uates at Tr. 827-33, 1073-74, 1494-1500. For a description of the Army training program and follow-up military experience, see testimony of Major Williams, Chief of the Individual Training Branch in the Training Programs Division of the Army Corps of Engineers at Tr. 1703-68, and PX 93, 95, and testimony of minority participants at Tr. 934-41, 1380-90, 1404-08, 1829-34, 3040, 3204.

12/ Between uly 1972, and November 1, 1974, 26.6% of the minorities admitted to the union came in through the school, but only 3.5% of the whites were admitted through the school. (App.I 87-88; DX G)

or as a non-operator.[13/] (App.I 94; Tr. 1408, 3134, 3140, 3141) The test is completely subjective, without uniform and objective criteria for determing the skill and proficiency required for a passing grade. (App.I 94-95; Tr. 316, 1431-33, 1508, 1604-07, 3111, 3573-74)

b. In obtaining work, minorities were disadvantaged, both by Local 15's collective bargaining agreements allowing contractors to hire union members directly and by the operation of the hiring hall. It was customary for contractors to hire union members who had previously worked for them, with or without going through the union's hiring hall.[14/] (App.I 90; App.II 120, 183, 225, 226, 312, 415; Tr. 254-55, 365, 669, 676, 787, 789) Since the union has been overwhelmingly white, this practice in itself excluded most nonunion minorities from a significant number of jobs.

Since most minorities seeking work in the union's jurisdiction were not members of the union, they were forced to rely on the hiring hall for job referrals. While the minority mem-

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13/ The union's alleged reason for requiring proficiency on three pieces of equipment was not that such proficiency is required for the safe and efficient performance of an operator's job, but that "it is to the individual's benefit that he operate more than one piece of equipment because if he is limited to that one piece of equipment, there will be that much less opportunity for him to be employed, particularly when there is hard times and great unemployment." (Tr. 288) Traditionally, men who became multi-skilled operators did so on the job, once they were union members. (Tr. 562-63, 398-99, 1879)

14/ Seventy percent of the union's members got work directly from the contractors. (App.I 90; Tr. 93)

in the absence of discrimination, minorities would be present

bership of the union was 6.5% in 1974 (and only 2% in 1965), the percentage of minority persons seeking work through the hall was substantially higher. (App.I 90; Tr. 1177, 1283, 1354, 1452)

Local 15's job referral practices at the hiring hall have been informal and unstructured,[15/] although union members were preferred over permit men. (App.II 96; Tr. 1354) Work assignments were not made in any logical order, such as first-come, first-served, or longest out of work.[16/] The business agents (who are all white) assigned jobs on the basis of their personal knowledge of the man's skills. Since the business agents knew mostly other union members (who are predominantly white) and knew few minority permit men, minorities were referred for work less frequently and waited longer for job referrals. (App.I 90-91, 112-13; Tr. 99, 256, 260-62, 856-57, 946-47, 1086-87, 1177-78, 1282-83, 1452, 1462-63, 3131-32, 3170, 3172, 3352)

c. Local 15's affirmative action efforts have been limited and have themselves discriminated against participating minorities. Although Local 15 participated in the New York Plan, it failed to meet the stated goal for placement of mino-

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15/ Although 15C and 15D maintain separate out-of-work lists (not through the hall), the referral system is similar and has the same effect on minorities (Tr. 343, 347-48, 353-36)

16/ The out-of work list was not maintained on a first-come, first-served basis. The list was signed some time after the men arrive on Monday morning, when the business agents would call for a sign-up, without reference to arrival time. Nor

(footnote continued on next page)

rity operating engineer trainees. (App.I 121; Tr. 3780-83, 3793-95) Even for the trainees actually placed, Local 15 failed to provide any structured or substantive training. (App.I 102; Tr. 1538-44, 3763, 3787-88) In fact, New York Plan trainees were required to wait three years before receiving a book, even if they had previous experience (Tr. 3475, 3489, 3492, 3612-13)--a period far in excess of the short period required of inexperienced whites. During this training period, trainees were not paid journeymen wages, as they would had they been working on permit or as union members, even when performing substantially the same work. (App.I 103; Tr. 1519-20, 1546-47, 3495, 3521-23, 3596, 3610) Local 15's agreement with the Recruitment and Training Program required the few minorities referred to it, initially, to work seven weeks before getting a book, and later, to pass a proficiency test on five pieces of equipment before receiving job referrals. (App.I 121-22; Tr. 3697, 3700-01)

3. Union Practices: Local 14

a. In order to gain admission to Local 14, the local required (1) possession of a New York City hoisting machine operator license, even though the City requires no license for the operation of much of Local 14's equipment and union members frequently specialize on non-licensed equipment;[17] (2) 200

16/ (footnote continued)
was any record kept of how long men had been out of work. (App.I 90-91, Tr. 273-75)

17/ Prior to 1965, Local 14's membership requirements specified only the possession of a license and sponsorship by two Local 14 members of five years' standing. (App.II 49-50, 60-61, 70-71)

days' experience operating Local 14 equipment, a requirement which is sometimes waived; (3) ability to operate two or more major pieces of equipment, although union members frequently specialize on only one piece of equipment; and (4) sponsorship by two Local 14 members of five years' standing who have known the applicant for at least two years. (App.I 78-80, 81, 98-99; App.II 82-83; Tr. 448-58)

New York City requires persons operating hoisting equipment on building construction[18/] to be licensed by the city pursuant to a prescribed examination. (App.I 79; App.II 449, 466-67) This hoisting equipment is in Local 14's jurisdiction. However, Local 14 members also operate substantial amounts of equipment which do not require a license, including front-end loaders, backhoes, power shovels, gradalls, tunnel mucking machines, compressors, wellpoint pumps, concrete mixing machines, welding machines, spreaders, locomotives, rollers and drag lines. (App.I 80; App.II 115; Tr. 3832-33) Nor does the licensing requirement cover any work performed for the Port Authority of New York (including the World Trade Center and airports), the New York State Dormitory Authority, the Urban Development Corporation, the Tri-Borough Bridge and Tunnel Authority, and

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18/ For example, the operation of the same equipment in some locations, such as private scrapyards, which are in Local 14-B's jurisdiction, does not require a license. (Tr. 404-05, 424)

most tunnel work.[19] (App.I 80; Tr. 3833-34) Between 5% and 25% of the equipment in Local 14's jurisdiction on a particular job does not require a license to operate. (App.I 80; Tr. 500 [90-95%],[20] 586 [10 to 1], 1825-26 [75-80% on superstructures; 75% in sewers; 45% in road construction].

Moreover, a number of Local 14 members specialize on non-licensed equipment, such as backhoes, rollers, or sewer work involving earth-moving equipment. (Tr. 396, 1823, 1930, 3832-33) The frequent specilization is demonstrated by the failure of many Local 14 members to renew their licenses: of the 1,055 Local 14 men (excluding 14B) working in 1973, approximately 261 (24.7%) worked without a license.[21] Presumably, they worked on non-licensed equipment since they could not legally operate machinery requiring a license. (App.II 466; Tr. 3830-31)

19/ Since building work, especially that involving structural steel, has been slow, the number of hoists and derricks (which require licenses) has been reduced. At the time of trial, there were 25-50 long-boom cranes (and never more than 100) and very few Chicago booms in use. On the other hand, there was a good bit of tunnel and other work involving non-licensed equipment which was expected to continue. (App.I 116-17; Tr. 560-62, 570, 584, 589, 3836; PX 16 at 18-20)

20/ This figure, cited by Business Agent Wade, included backhoes which in fact do not require licenses. (Tr. 3832)

21/ Between September 1, 1973, and August 31, 1974, 456 of Local 14's 1,432 members (excluding 14B) failed to renew their licenses. (App.I 98; PX 91, 91A) Despite Local 14's contention to the contrary (Brief at 40), those with renewal applications pending were treated as renewed in this compilation. (Tr. 1687-88) Of the 456, 195 earned no income during 1973 and were presumably retired. Similarly, 182 licensed members earned no income. These figures were calculated from PX 91, 91A, 91B.

Local 14's requirement that an applicant demonstrate proficiency on two or more major pieces of equipment (App.II 70, 82) was said to have been instituted "for his own good," that is, to increase his ability to earn a living (Tr. 466, 503-04), even though many Local 14 men themselves choose to specialize on one type of equipment. (App.I 118; App.II 113; Tr. 395, 472, 520, 580, 1823, 1930-32) If the specialists wish to learn other equipment, they either learn on their own[22/] or attend Local 14's retraining facility, which is available only to union members. (App.I 97, 115; Tr. 447, 562-63, 580-81, 598-99, 1879)

Local 14 draws most of its applicants from the predominantly white Local 15. The usual method of acquiring the necessary training and experience was to have a friend or relative in Local 14 give informal on-the-job training. (App.I 97-98, 114, 117-118; PX 35 at 2) A willing Local 14 operator, who is usually a friend or relative, informally trains a Local 15 man, usually an oiler (a relatively unskilled position), on the job.[23/] The operator demonstrated the controls and allowed the trainee to run the crane, sometimes actually to lift loads even though the trainee did not have a license. (App.II 105-06; Tr. 136-39, 410-12, 514-15, 534,

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22/ Many of the skills needed to operate one piece of equipment are readily transferable to another piece of equipment. (App.II 115; Tr. 400-01, 519, 521, 544, 598-99, 1863, 1870, 2068-69)

23/ Oilers usually come from the ranks of the longer-tenured 15 members. Most of the minority members of Local 15 have been recently admitted. (Tr. 3134; see supra at 8)

599-600, 611, 617, 1854-55, 3134-36; PX 16 at 5; PX 13B at 790-91)

Since the City requires two years experience as an oiler or assistant to a crane, derrick, or cableway operator, in order to be eligible for a license (App.II 467) and the union requires for membership both a license and 200 days of experience, informal training effectively excluded minorities from the only training available in New York.[24/] (App.I 98, 114-15, 119) As a result, few minorities possess the requisite city license. For example, of the more than 1000 A and B licenses renewed in 1974, only four belonged to minority individuals. (App.I 98; App.II 461; Tr. 1692)

Local 14's membership has remained quite constant over the years since Local 14 limited the size of its membership according to the work conditions. When work is slow, the union "closes its books," i.e., stops processing applications, and when work improves, it processes a limited number of men. (App.II 90, 91, 100, 101-02, 518-19, 523)

b. Union members, almost all of whom are white as a result of the practices described supra, have enjoyed considerable advantages in obtaining employment. Local 14's collective bargaining agreements, like those of Local 15,

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24/ At least 50% of Local 14's members come from Local 15. Other avenues of acquiring the requisite experience are through the Armed Services, in another operating engineer local, or otherwise outside New York. (App.I 77, 97; Tr. 407-09, 451-52, 558-59).

allow contractors to hire union members directly without reference to the hiring hall, and many do so. As a result, the majority of Local 14 members keep jobs with the same employer on different jobs over a period of years. (App.II 114; Tr. 467-69, 588)

The remaining union members and non-union persons (whether licensed or non-licensed) seeking work use the hiring hall. It is maintained on the same premises as Local 15's hall because much of the equipment is jointly manned by 14 and 15 men, and the business agents find it useful to exchange information concerning jobs. (App.I 100; Tr. 470, 616-17) In referring men for work, the business agents give preference to union members, granting permits to non-union individuals only when no union men are unemployed. (App.I 100, 119-20; App.II 91; Tr. 417-19, 550-51, 583) Other than union affiliation, there are no objective criteria for assigning jobs from the out-of-work list: the business agents refer people according to their personal knowledge of the men's skills and experience. (App.I 100, Tr. 471-75, 566-68)

c. Local 14 has taken no steps to participate in ongoing affirmative action programs or to initiate its own. (App.I 123)

C. Order and Judgment of the District Court

Based on the facts summarized above, the district court found that both Locals 14 and 15 had engaged in a pattern and practice of discrimination against minorities, in violation of Title VII. (App.I 104-27)

After considering proposed orders submitted by Locals 14 and 15, GCA and the government; extensive argument thereon held on July 26, 1976,[25] at which Locals 14 and 15, and GCA presented their views concerning appropriate relief (App.I 128-203); and written comments submitted by the parties (App.I 204-38),[26] the district court on September 1, 1976, entered a comprehensive order. (App.I 239-71)

The district court ordered, inter alia, the following affirmative relief:

(1) Appointed an Administrator, to be compensated by the unions, to implement the provisions of the Order (App.I 243-47);

(2) Established a remedial goal of 36% minority membership in the unions, to be achieved by 1981, with stated annual interim goals (App.I 242-43);

25/ At the hearing, the court indicated that it had considered the proposed orders and would use the government's proposed order as the working basis for a final order because it was the most comprehensive one submitted. (App.I 130, 141)

26/ Allied Metal Building Industries did not submit a proposed order, appear at the hearing, or submit written comments.

(3) Established specific objective, non-discriminatory criteria for admission of minority applicants to union membership, and defined the means by which such criteria are to be applied. (App.I 247-49) The decision as to the admission of a particular applicant is to be made by the union. Rejected applicants may appeal to the Administrator who may order appropriate action or order qualified applicants admitted (App.I 248, 250);

(4) Established objective, non-discriminatory work referral procedures. The Order established a single hiring hall, one "Master Eligibility List" (containing information concerning each individual's union status, minority status, qualifications and licenses), and a joint hiring hall sheet. Any person seeking referral must register on a chronological hiring hall sheet. Referrals are to be made to individuals with the requisite qualifications for the particular job on a "first-come, first-served" basis. (App.I 253-60)

All work is to be obtained through the hiring hall and not directly from contracting employers. However, contractors may transfer workmen from job site to job site without the men registering in the hiring hall as long as there is no break in the continuity of the man's

employment of more than three days.[27/] (App.I 253, 261) Contractors retain the right to lay off any workman for cause (App.I 261);

(5) Ordered the unions to submit plans for separate training programs for training operating engineers in their respective trade jurisdictions in order to graduate a substantial number of minority operators each year. Satisfactory performance on one piece of equipment shall constitute completion of the training program (App.I 263-64);

(6) Back pay is to be awarded to any minority who files a written claim within a specified time and who presents evidence (testimonial or documentary) of application for direct entry into the unions, or for job referral by the unions; and demonstrates that he was discriminatorily excluded from union membership or denied the opportunity for job referral or training, and, as a

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27/ The Administrator has already ruled that in one instance where construction work commenced in May 1975 was shut down on December 3, 1975, by the City because of unanticipated subsoil conditions, the contractors may rehire the 22 formerly employed operating engineers when work resumes, without reference to the hiring hall. The Administrator stated that he does not believe that the provision of the Order concerning the three-day break-in-employment governs a situation where the contractor shuts down its entire operation through no fault of its own for an extended period of time and resumes that work at a later date. The Administrator stated that its decision should not be interpreted to be applicable to other situations beyond the specific facts of the situation before him. A copy of the decision is appended to this brief as Attachment A.

result, suffered monetary damages.

If the claimant shows discriminatory treatment by the union in at least one month, he shall receive back pay for any additional months in which he can prove he was ready, willing and available to take work under the union's jurisdiction, but worked or sought work elsewhere because of a reasonable belief that this course properly served his interests in light of the union's discriminatory policies. The Order describes the method of computing the amount of back pay to be awarded. (App.I 265-68)

The affirmative provisions of the Order remain in effect until the remedial goals are achieved, or until September 1, 1981, whichever occurs later. (App.I 270)

ARGUMENT

I. THE DISTRICT COURT'S FINDING THAT LOCALS 14 AND 15 ENGAGED IN A PATTERN AND PRACTICE OF DISCRIMINATION AGAINST MINORITIES IN VIOLATION OF TITLE VII IS FULLY SUPPORTED BY THE EVIDENCE.

The district court's findings of fact, far from being clearly erroneous, are overwhelmingly supported by the evidence. In addition to the compelling statistical evidence, uncontroverted at trial, demonstrating the historical and contemporary predominance of whites in both locals' membership, the evidence adduced at trial (including the testimony of union officials and business agents, as well as minority witnesses called by the government and both unions) demonstrated both active, contemporary discrimination and perpetuation of past discrimination by the unions' membership, recruitment, training and referral practices.

A. The statistical evidence presented a prima facie case of discrimination.

At the time of trial, September 1974, only 6.5% of Local 15's 6,362 members and 2.8% of Local 14's 1,555 members were minorities. By comparison, minorities comprised 36.39% of the relevant labor pool, the New York City male labor force 16 years of age and over, with a high school education or less.

The unions concede that statistical evidence of a substantial disparity between minority representation in a union's membership and the relevant labor pool establishes

a prima facie case of a pattern and practice of discrimination in violation of Title VII. E.g., United States v. Elevator Constructors, Local 5, 538 F.2d 1012, 1015 (3d Cir. 1976) and cases cited therein. Their contention is that the district court compared inappropriate statistics (even though they presented no evidence at trial of alternative statistics). The particular statistics and bases of comparison used by the district court are, however, almost identical to those used in other union cases in the Southern District of New York and approved by this Court.[28] EEOC v. Local 638 . . . Local 28, Sheet Metal Workers, 401 F.Supp. 467, 488-89, 492-93 (1975), aff'd, 532 F.2d 821 (1976); Rios v. Enterprise Assn. Steamfitters, Local 638, 400 F.Supp. 983 (1975), on remand from 501 F.2d 622 (1974).[29]

The definition of the relevant labor pool as males in the labor force, 16 years of age and over, with a high school education or less, residing in the unions' territorial jurisdiction (here, the five counties of New York City) is entirely

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28/ The minor variations among the three formulae would barely affect the final percentages--and certainly are not enough to cast doubt upon the government's prima facie showing. For further discussion of the formulae, see discussion of the remedial goal, infra at 45-49.

29/ In light of the reporting and citation of these cases under differing names, they will hereafter be denominated, respectively, Sheet Metal Workers, Local 28 and Steamfitters, Local 638.

Metal Lathers, Local 46, supra, 328 F.Supp. at 434-45.

appropriate, since the evidence showed that Local 15 draws its members primarily from inexperienced workers, and Local 14 drew its members largely from Local 15. The use of such data is in complete accord with this Court's direction in Steamfitters, Local 638, 501 F.2d at 632-33, consistently followed thereafter. Sheet Metal Workers, Local 28, supra; Patterson v. Newspaper and Mail Deliverers' Union, 384 F.Supp. 585 (S.D.N.Y. 1974), aff'd, 514 F.2d 767, 772 (2d Cir. 1975), cert. denied, ___ U.S. ___, 96 S.Ct. 3198 (1976). The limitation of the labor pool to the five counties of New York City was proper since, as the district court found, only 180 of Local 15's more than 6,000 members (all in 15C), worked outside New York City. (App.I 125) The labor market where the work is performed is particularly relevant in determining the availability of minority workers to work in the city since they tend to be concentrated therein. Not only the decisions of this Circuit cited above but other courts as well, have consistently looked at the labor pool in the geographic area in which the union performs most of its work rather than the area in which the union members reside. E.g., United States v. Elevator Constructors, Local 5, supra, 538 F.2d at 1015-16.

Courts rely on statistics showing an imbalance between the representation of minorities in a union's membership and their representation in the relevant labor pool as presenting a rebuttable prima facie case, because it is presumed that,

in the absence of discrimination, minorities would be present in the union in substantially the same proportion as in the labor pool. E.g., Steamfitters, Local 638, 501 F.2d at 632; Kaplan v. IATSE, 525 F.2d 1354, 1358 (9th Cir. 1975); United States v. United Brotherhood of Carpenters, Local 169, 457 F.2d 210, 214 (7th Cir.), cert. denied, 409 U.S. 851 (1972). In light of the fact that the workers are drawn from inexperienced groups, there is no reason to compare membership in the union to the representation of minorities in the construction industry generally where, for other work in the construction industry, previous training and experience may be significant factors.

Local 15 argues that, rather than looking to the total minority representation in the union, the court should have considered the rate of admission to the union after 1965. (Brief at 32-33) While the figures do show an increased percentage of minority admissions after the enactment of Title VII, they still fall so short of the percentage of minorities in the labor pool as not to destroy the government's prima facie case, even as to admissions themselves. And, for the purposes of considering the discriminatory effect of various union practices, discussed infra, the overwhelmingly white composition of the union, even with the more liberal admission policy after 1965, is, necessarily, the significant factor.

B. The unions' recruitment, training, membership and work referral practices, which operated to exclude minorities, thus perpetuating the past discrimination, were not justified by business necessity.

The statistical prima facie case of pattern and practice of discrimination was buttressed by the other evidence showing that the general underrepresentation of minorities in the unions was not accidental or inadvertent, but the direct result of the unions' recruitment, training, admission and referral practices. As the district court found, there was abundant evidence of the manner in which these practices operated to exclude minorities disproportionately, even if not intentionally, and therefore to perpetuate the historical white composition of the unions.

Practices which, although neutral on their face, operate so as to exclude disproportionately minorities[30/] or to perpetuate the effects of past discrimination are unlawful unless proved by defendants to be required by business necessity. E.g., Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971); Sheet Metal Workers, Local 28, 532 F.2d at 825; United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971).

30/ Even though some minorities are not handicapped by such practices, they are discriminatory if they bar more minorities than whites. Cf. Griggs v. Duke Power Co., supra, where the educational requirement did not bar all blacks.

To show business necessity, defendants have the burden of proving that a practice is essential to the safe and efficient operation of the job, and that the necessary safety and efficiency cannot be achieved by an alternative system with less discriminatory effects. United States v. Bethlehem Steel Corp., supra, 446 F.2d at 662. The district court properly found that the unions here failed to show business necessity for their discriminatory practices.

1. Local 15

a. Local 15 relied on word-of-mouth, favoritism, and nepotism, practices universally condemned as necessarily perpetuating a largely white union membership. Steamfitters, Local 638, 360 F.Supp. at 990, aff'd, 501 F.2d 622; United States v. Wood, Wire and Metal Lathers, Local 46, 328 F.Supp. 429, 436 (S.D.N.Y. 1971), aff'd, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973); United States v. Ironworkers, Local 86, 433 F.2d 544, 548 (9th Cir.), cert. denied, 404 U.S. 984 (1971); United States v. United Brotherhood of Carpenters, Local 169, supra, 457 F.2d at 217. Because the work referrals and subsequent on-the-job training necessary to gain admission to the union under the union security clauses of Local 15's collective bargaining agreements depended so heavily on having friends or relatives in the union, minorities, who disproportionately did not have such

connections in the largely white union, were at a severe disadvantage.[31/]

When Local 15 instituted its testing and training requirements in 1971, the situation did not improve, but perhaps worsened for minorities, for those stricter requirements were applied almost exclusively to minorities. Whites continued to enter the union through the traditional route, getting a job through the hiring hall, with the assistance of friends and relatives, and performing their job to the satisfaction of the employer on one piece of equipment, or even as a non-operator. In contrast, minorities, even those with extensive experience outside the United States, or in the armed services or the IUOE-Job Corps training program, were generally required to demonstrate proficiency on three pieces of the equipment at the new training facility, and if they failed, attend the school until they could pass the test.

31/ Local 15's contention that it had "little to do with determining who becomes a member" (Brief at 34) because, it claims, applicants were hired directly by the contractor, without any assistance from the union, is simply contrary to the evidence. See, e.g., Local 15's Minutes showing discussion at union meetings of union efforts to find jobs for friends and relatives of union members. (App.II 93, 94, 95)

This statement by Local 15 is but one example of its continual refusal to accord any weight to the findings of the district court but merely to describe its own view of union practices as the "truth."

The test was patently not job-related and therefore not necessary to the safe and efficient performance of available jobs since (1) it did not test skills for the many available non-operator jobs; (2) satisfactory performance (as determined by continued employment for seven days) on one, rather than three, pieces of equipment had always been deemed sufficient; and (3) it did not even demonstrate proficiency on three pieces of Local 15 equipment, since much of the equipment actually used on the job sites was not available at the school. That the union did not believe the test essential to determine adequate job performance is demonstrated both by its selective application (see United States v. Jacksonville Terminal Co., 451 F.2d, 418, 456 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972)), and by the union's referral of minorities to jobs even though they had failed the operating test.

Thus, the new testing and training requirement not only disproportionately delayed the entrance of minority persons into the union, but its disparate application to minorities was evidence of active, contemporary discrimination.[32/] Sheet Metal Workers, Local 28, 532 F.2d at 826 (cram courses

32/ The impact of the testing requirement was aggravated by the inconsistent and subjective standards for measuring proficiency. It should also be noted that the test has not been validated according to the requirements of EEOC Guidelines, 29 C.F.R. §1607.1 et seq.

available to relatives of present union members, but not minorities); Steamfitters, Local 638, 360 F.Supp. at 989 (admitting whites by informal standards while denying admission by these standards to minorities); United States v. Ironworkers, Local 86, supra, 443 F.2d at 458 (tests and admission criteria with both differential exclusionary impact and differential application).

b. The union's subjective referral practices placed at a disadvantage not only those minorities not yet admitted to the union, but also those minority union members who, for the most part, were recently admitted, since the business agents, who are all white, relied on their personal knowledge of the man's skills, and knew at most only a few hundred members. Thus, as the district court found, the referral practices had the demonstrated result that minorities generally waited longer than whites for job referrals and worked less frequently, even though the discrimination was not "deliberate." United States v. United Brotherhood of Carpenters, Local 169, supra, 457 F.2d at 215; see also Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 440-41 (5th Cir.), cert. denied, 419 U.S. 1033 (1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 240-41 (5th Cir. 1974).

c. Even Local 15's "affirmative action" efforts have overtly discriminated against the participating minorities. Under Local 15's agreement concerning its participation

in the New York Plan, operating engineer trainees were required to work far longer (three years) and at lower wages in order to receive a union book, than other inexperienced newcomers performing substantially similar work. Similarly, the minority participants in the Local 15-Recruitment and Training Program plan were required, under the first agreement, to work seven weeks before receiving a book, and under the second agreement, to demonstrate proficiency on five pieces of equipment before even being referred for work.

2. Local 14

a. Local 14's recruitment, training and work referral practices, and its admission criteria have similarly disproportionately handicapped minorities, thereby perpetuating its past discrimination. Local 14's reliance on the predominantly white pool of Local 15 members (itself resulting from discrimination) serves to preserve the historical white membership of the union. It is a violation of Title VII to draw employees from a source known to be predominantly composed of non-minority groups. Gates v. Georgia Pacific Corp., 492 F.2d 292, 296 (9th Cir. 1974); EEOC v. New York Times Broadcasting Service, ___F.2d ___, 13 FEP Cases 813,816 (6th Cir. 1976). Even assuming that the requirement of 200 days of experience on specified heavy equipment is a legitimate requirement for union membership, the union's practices were discriminatory in that they prevented minorities from

gaining access to that experience in the same manner as whites.[33/]

b. The absolute requirement of a City hoisting machine operators license (itself requiring two years' prior appropriate experience) effectively barred many minorities from Local 14. It cannot be justified by business necessity as a condition to membership in the union, although it is a legitimate requirement for certain types of work within the union's jurisdiction. A significant amount of the equipment in Local 14's jurisdiction does not require a license, especially at times when tunnel work predominates. Indeed, many Local 14 members specialize on that non-licensed equipment. That the lack of a license need not preclude being gainfully employed on Local 14's equipment is further demonstrated by Local 14's occasional referral of non-licensed persons from out-of-town operating engineers locals and non licensed minorities when work is very busy.[34/] As noted in the Statement, supra at 17, a significant number of white

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33/ Local 14 does not even claim that its requirement, instituted in 1965, that an applicant operate two or more pieces of specified heavy equipment is necessary to be a safe and efficient operator, but rather that it increases his versatility, thereby enhancing his ability to earn a living. The fact is that three-quarters of the union members choose to specialize. (Statement, supra at 18)

34/ Several non-licensed blacks have been working for three years on one job on permits. (Tr. 591-92)

licensed union members have allowed their licenses to lapse.

Local 14 argues (Brief at 35) that the licensing requirement is a business necessity because of the prerogative of employers to transfer workers from one piece of equipment to another. But an employer could not transfer any of the men working with lapsed licenses to any licensed equipment and the specialization by as many as three-quarters of the Local 14 men (Tr. 395) effectively prevents their productive transfer. Moreover, the collective bargaining agreement provisions limit the circumstances in which men can be transferred from one machine to another (e.g., an emergency or equipment breakdown) without extra pay. E.g., App.II 195.

c. The union's preferring of its members in work referral, giving permits only when its supply of union men is exhausted, effectively forecloses qualified non-union minorities from equal work opportunities. E.g., United States v. Elevator Constructors, Local 5, supra, 538 F.2d at 1014; Kaplan v. IATSE, supra, 535 F.2d at 1357.

3. Practices of Both Unions

The provisions of both unions' collective bargaining agreements--and the practice under them--which allow contractors to hire union men directly, and union men to seek work directly, without reference to the hiring hall perpetuates past discrimination. The practice under these agreements is for employers frequently to rehire on numerous

projects union members who have previously worked for them, or for union men to seek work directly from employers on the basis of word-of-mouth information from union friends. The individuals who have built up the connections necessary to benefit from this arrangement are inevitably the members of the two unions whose other practices have effectively kept the unions largely white. United States v. Wood, Wire, and Metal Lathers, supra, 328 F.Supp. at 432-33, 434-35.

II. THE RELIEF ORDERED BY THE DISTRICT COURT WAS APPROPRIATE FOR THE VIOLATIONS FOUND.

Title VII grants to the district courts broad discretion to fashion the most complete affirmative relief appropriate to restore the persons aggrieved by discriminatory practices to the position they would have occupied absent discrimination. E.g., Franks v. Bowman Transportation Co., 424 U.S. 747, 763-64 (1976); Steamfitters, Local 638, 501 F.2d at 629. The choice of appropriate remedies is left, in the first instance, to the district court, whose discretion should be overruled only for compelling reasons. Franks v. Bowman Transportation Co., supra, 424 U.S. at 770-71; Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975); Erie Human Relations Commission v. Tullio, 493 F.2d 371, 374 (3rd Cir. 1974).

This Court has consistently upheld far-reaching decrees designed to remedy discriminatory practices of other trade unions. Sheet Metal Workers, Local 28, supra; Steamfitters, Local 638, supra; Patterson v. Newspaper Deliverers Union, supra; United States v. Wood, Wire & Metal Lathers, Local 46, supra. The relief ordered in this case is in conformity with those decisions. It was properly deemed necessary to correct the multiple unlawful discriminatory practices

found by the district court.

A. Referral Practices

Appellants concentrate a major part of their objections on the requirement of the decree that all work be obtained through the hiring hall and not directly from contracting employers. This relief is, however, central to eradicating the longstanding advantages of the overwhelmingly white membership of both unions gained as a result of past discrimination. It is necessary in order for minority workers to achieve their rightful place in the allocation of union work.

Under the collective bargaining agreements negotiated by Locals 14 and 15, union members have sought and obtained work directly from contractors, usually through the informal sharing of information among union friends and the regular reporting of upcoming work at union meetings.[35/] Similarly, under the agreement, contractors regularly seek out previous union employees. Statement, supra at 7,13,19. As a result of these practices, as well as each union's referral of union men before permit men, the nonunion minorities have

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35/ E.g., App.II 93; PX 10, Minutes of 10/13/72 at 3; 12/8/72 at 3 (Local 14); PX 11, Minutes of 5/6/71 at 2-5 (Local 15-15A); 7/12/71 at 2 (15C); 4/14/71 at 4 (15D).

been generally foreclosed from acquiring the work contacts with contractors which result in long-term employment.

In order to allow minorities to gain access to the job opportunities effectively closed to them by these practices, the district court ordered that, for the term of the decree,[36] all work is to be obtained through the hiring hall, although contractors may transfer workmen from job site to job site without the men registering in the hiring hall, as long as there is no break in the man's employment of more than three days.[37] This provision of the order will provide the opportunity for qualified minorities to build the same contacts presently held by white union men, so that, when the decree dissolves, minorities will be in a position to compete equally for jobs. See United States v. Wood, Wire and

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36/ The affirmative provisions of the decree expire in 1981, or whenever the remedial goal is achieved, whichever is later.

37/ A reasonable interpretation of the three-day break-in-employment provision is that it refers to breaks that can be anticipated by the nature of the work. Thus, brief layoffs resulting from temporary shutdowns caused by inclement weather would not constitute a break in employment. However, a regular, anticipated seasonal shutdown because of weather of more than three days would require registering in the hiring hall. Similarly, layoffs of more than three days caused by the completion of one phase of the construction project are anticipated breaks in employment and would require registering in the hiring hall. See Administrator's Decision, Attachment A to this brief.

Metal Lathers, Local 46, supra, 328 F.Supp. at 434-45.

Such a modification in discriminatory work referral practices is authorized by Title VII. It does not require that any incumbent employee be "bumped" from a job currently held, but rather that future vacancies be filled on a non-discriminatory basis.[38/] E.g., United States v. Bethlehem Steel Corp., supra, 446 F.2d at 659-60; Patterson v. Newspaper & Mail Deliverers Union, supra. Nor does it force contractors to employ unqualified persons. Referrals are to be made on the basis of carefully delineated objective job-related criteria, and contractors retain the right to lay off any referred person found to be unqualified.[39/] (App.I 235-55, 259-61, 264-65)

The court order does not invalidate the relevant portions of the collective bargaining agreement but merely suspends

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38/ To the extent that the expectations of white union members will be frustrated, those expectations, which are based on an unlawful system, must yield to a nondiscriminatory future. United States v. Bethlehem Steel Corp., supra, 466 F.2d at 663.

39/ The argument that licensed hoisting operators may not be qualified even though they have met the City's two years experience requirement and passed the City's test cannot be accepted, especially in light of Local 14's insistence that the licensing test is job-related. In any event, the defendants have applied to the Administrator for modifications in the qualifications classifications, including a crane operator-steel erection category. The order gives the Administrator the power to make such changes, if necessary. (App.I 272) In order to justify such an alteration, the defendants would need to demonstrate that such a specialized category is

(footnote continued on next page).

their discriminatory operation for the term of the decree. In any event, it is well established that a court has the authority to modify provisions of a collective bargaining agreement which are themselves unlawful or, although neutral, unlawfully perpetuate past discrimination. E.g., United States v. Elevator Constructors, Local 5, supra, 538 F.2d at 1017; United States v. Sheet Metal Workers, Local 36, 416 F.2d 123, 132 (8th Cir. 1969); Local 53, Heat & Frost Workers v. Vogler, 407 F.2d 1047, 1054 (5th Cir. 1969); Dobbins v. Local 212, IBEW, 292 F.Supp. 413 (S.D.Ohio 1968). See also Local 189, Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

Local 14's contention that the court-ordered referral procedures invalidate a bona fide seniority or merit system protected by Section 703(h) is without merit. The informal system of calling back preferred employees can hardly be characterized as a seniority or merit system, since no person

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39/ (footnote continued)
essential to the safe and efficient operation of the job at issue, particularly in light of the testimony at trial that crane operating skills are readily transferrable. E.g., Tr. 544-47.

working in the unions' jurisdiction acquired any guaranteed right to a job by virtue of job longevity or merit. Any re-employment occurred solely at the whim of the employer; an employee refused rehire had no redress.

The joint operation of the hiring hall is simply an adjunct to the court-ordered non-discriminatory referral system. It is based on testimony at trial that the two locals maintained hiring halls in the same room, that much of the equipment in the unions' jurisdictions is either very similar or jointly manned by 14 and 15 men, and that the business agents have cooperated in exchanging information concerning jobs.[40/] Statement, supra at 19. However, because of each union's illegal preferential referral of its own union members, this system has resulted in barring qualified minorities from seeking work from both unions, and is not justified by business necessity. A joint hiring hall will maximize work opportunities for minorities, and will operate with less discriminatory impact. United States v. Bethlehem Steel Corp., supra, 446 F.2d at 662. Cf. Steamfitters, Local 638, 360 F.Supp. at 990, and 6 FEP Cases 319, 337; Sheet Metal Workers, Local 28, 401 F.Supp. at 474, and 12 FEP Cases 733,

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40/ New York City is the only geographic location in which there are two separate operating engineers locals.

737, requiring some systematized work referral procedures where previously there had been none, in order to maximize minority access to job information.

B. Appointment of an Administrator

The use of an Administrator to implement affirmative action orders in union discrimination cases has become commonplace in this Circuit. E.g., Sheet Metal Workers, Local 28, 532 F.2d at 829; Steamfitters, Local 638, 501 F.2d at 627; United States v. Wood, Wire & Metal Lathers, Local 46, supra.

In view of the complexity of the multiple discriminatory practices being corrected in this case, their interlocking nature, and the sheer size of the unions (about 8,000 members), the aid of an Administrator to oversee the smooth operation of the order is appropriate. Interpretations and possible modifications of the decree in the light of actual experience must be anticipated. There is no need to have the court itself burdened with the duty of resolving every minor issue. As already appears from the resolution of the three-day issue (see ns. 27 and 37) and the application for modification of the qualifications classifications (see n. 39), the unions and the plaintiff, as well as any other affected party, may avail themselves of the services of the Administrator. There is thus no merit to the unions' contention that appointment of an Administrator is "punitive" and should not be sanctioned unless the district court explicitly finds that the unions

had engaged in "egregious" discrimination or had shown bad faith, as in Sheet Metal Workers, Local 28. The appointment of an Administrator turns on his or her potential usefulness in light of the complexity of the case rather than on the degree of "culpability."

C. Remedial Minority Membership Goal

1. This Court has consistently approved the use of generalized remedial goals affecting a large, diffuse entry-level group to remedy long-continued, deeply engrained past discrimination, although it has sometimes disapproved the imposition of quotas (i.e., admission, hiring or promotion on a minority/white ratio basis) which directly impact on a small identifiable group of individuals, especially in the absence of proof of a clear-cut pattern of long-continued discrimination. E.g., Sheet Metal Workers, Local 28, 532 F.2d at 827-88, 830-31, approving an overall minority membership and apprenticeship goal, but disapproving both replacement of one of the three white representatives with a minority person and an admission ratio of 3 minority to 2 white apprenticeship applicants in disregard of the results of neutral, job-related tests; [41] See also, Steamfitters, Local

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41/ Similarly, in Kirkland v. New York State Department of Correctional Services, 520 F.2d 420, 428-30, rehearing denied, 531 F.2d 5 (2d Cir. 1975)(en banc), cert. denied, __U.S.__, 97 S.Ct. 73 (1976), this Court approved immediate proportionate advancement for those held back by the particular examination adjudged to have been discriminatory but, in light of the

(footnote continued on next page).

638, 501 F.2d at 628-32 (approving an overall minority membership goal).

Here, the district court did not impose any specific minority/white admission ratio, but merely ordered a general minority membership goal (36% of total union membership, to be achieved by 1981). The impact of the goal here will be dispersed among an unidentifiable group of unknown, potential applicants, as in Sheet Metal Workers, Local 28. In light of the evidence in this case the long-standing, flagrant discrimination can hardly be doubted.

2. The specific membership goal of 36%, and the manner of reaching that goal,[42] both challenged by the unions, are also in accord with the law of this Circuit, specifically, the principles and formulae set forth in Sheet Metal Workers, Local 28, 401 F.Supp. at 488-89, 429-93, aff'd, 532 F.2d at 830; Steamfitters, Local 638, 400 F.Supp. 983, on remand from 501 F.2d at 632-33.

41/ (footnote continued)
paucity of the proof concerning past discrimination, disapproved a future minority/white promotion ratio as to future lists. See also Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), disapproving a layoff plan contrary to normal reverse seniority, designed solely to preserve a specific minority/white ratio.

42/ For a description of the method used in compelling the statistics used by the district court, see Tr. 201-26 and App.II 33-42.

Since the purpose of a remedial goal is to place eligible minorities in the position they would have achieved in the absence of discrimination, the court must determine what percentage of the union membership would be minority individuals had they been able to enter the union uninhibited by the unions' discriminatory practices. Sheet Metal Workers, Local 28, 401 F.Supp. at 488. There is a presumption that, as to entry-level jobs with no particular qualifications, minorities, in the absence of discrimination, would be present in the union in the same proportion as in the relevant labor pool. A remedial goal is, therefore, properly set at the percentage of minorities in the relevant labor pool.

For the reasons stated supra at 25-27, and in the district court's opinion (App.I 105-06), the relevant labor pool here is the New York City male labor force 16 years of age and over, with a high school education or less. The objections raised to the definition of the relevant labor pool in the context of the proper remedial goal are the same as those raised in the context of the prima facie showing, and are answered, supra, at 25-27.

The specific corrections in the goal urged by Local 14 (Brief at 55-56), but not presented in the district court, are either unwarranted in light of the facts of this case,

or so minor as to affect only marginally the final goal in this case:[43/]

(a) Adjustment for the percentage of the Spanish language population that is male would not affect the outcome at all;[44/]

43/ The government agrees that the "double count" of Spanish origin males who are black should have been taken into account. Sheet Metal Workers, Local 28, 401 F.Supp. at 489, 492, and Steamfitters, Local 638, 400 F.Supp. at 986. However, application of the "undercount" figure (see infra at 49) appears to eradicate the effect of not including the "double count."

In any event, the statistics presented by the government are conservative since they do not take into account the increase in minority participation in the labor force between 1970 and 1976. Cf. PX 3 at 22.

44/ Since there are no figures available in the Census for Spanish language males, it is presumed that the percentage of males in the Spanish language and Puerto Rican populations are the same, 47.5%. 401 F.Supp. at 492 n. "C"; Tr. 206.

The total Spanish language population figure was used only in Table C (App.II 39) to determine the total number of Spanish language males above 16 years of age in the labor force, by dividing Spanish language population by total Puerto Rican population. Therefore, an adjustment by the "male factor" would produce an identical result.

For example, based on information derived from Table C of the government's exhibit (App.II 39):

Bronx: $\frac{\text{Spanish language population}}{\text{Puerto Rican population}} = x$

Bronx (without applying male percentage):

$$\frac{407,322}{316,772} = 1.29$$

Bronx (applying male percentage):

$$\frac{407,322 \times .475}{316,722 \times .475} = \frac{193,477.95}{150,466.7} = 1.29$$

(b) Use of the civilian male labor force rather than the male labor force, assuming it is appropriate, produces insignificant differences in the results because of the tiny differences in the two figures;[45/]

(c) Local 14's proposed adjustment for percentage of "cranemen, derrickmen and horstmen" nationwide who have obtained a high school education or more is inappropriate for several reasons.[46/] The evidence in this case showed that neither union requires a high school education as a prerequisite for admission to either union. Moreover, the occupational category proposed by Local 14 inadequately decribes

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45/ E.g., from the appropriate census figures (App.II 23-30):

	All Males 16 & over	Negro Males 16 & over	Puerto Rican Males 16 & over
Bronx			
Total labor force	335,518	68,107	60,241
Civilian " "	334,309	67,827	60,050
Civilian labor force as % of total labor force	99.63%	99.96%	99.68%

46/ The court in Sheet Metal Workers, Local 28, incorporated the national distribution of sheet metal workers in each educational category, but did not take into account, as did the court in Steamfitters, Local 638, the disproportionately high number of minorities who have no high school education.

the differing occupations (as defined by the Census) included within the operating engineers local. The unions cover not only cranemen but also other heavy equipment operators, mechanics on heavy equipment, surveyors and many relatively unskilled workers.

Since only some of these categories are included in any usable fashion in the U.S. Census,[47] it is appropriate to ignore the educational distribution among some of the unions' workers, and define the labor pool as those with a high school education or less;

(d) Application of the Census "undercount"[48] figure applied here and in Steamfitters Local 638, (but not in Sheet Metal Workers, Local 28) is appropriate because the failure to take it into account would seriously distort the actual numbers of blacks in the labor force.

47/ See 1970 Census of Population, Occupational Characteristics, PC(2)-7A, Table 5.

48/ The "undercount" fraction, as determined by the Bureau of the Census, measures omission in coverage in the gathering of data for the decennial Census. Steamfitters, Local 638, 400 F.Supp. at 987-88.

The Census provides no "undercount" figure for the Spanish language population. Therefore, the statistics as to Spanish language males are uncorrected. To that extent, any over-inclusiveness of the Spanish language category is offset.

D. Back Pay

The district court ordered that back pay be awarded to any minority demonstrating (by either testimonial or documentary evidence) application for direct entry into the unions or for job referral by the unions, discriminatory exclusion from union membership or denial of the opportunity for job referral or training, and resulting monetary damages. The union challenges only that additional part of the order which provides that, if the claimant shows discriminatory treatment by the union in at least one month, he shall receive back pay for any additional months in which he can prove he was ready, willing and available to take work under the union's jurisdiction, but worked or sought work elsewhere because of a reasonable belief that this course properly served his interests in light of the union's discriminatory policies.

This provision of the back pay award comports with this Court's decision in Steamfitters, Local 638, __F.2d__, 13 FEP Cases 705, 710-11 (1976), concerning the availability of back pay to victims of discriminatory work referral

practices.[49] It serves the "make whole" objective of Title VII tc award back pay to a claimant who, having been unsuccessful in finding work through the union because of the union's discriminatory practices, abandoned that course of conduct as demonstrably detrimental to his financial interests.[50] It would be inequitable to make restitution dependent on a stubborn adherence to obviously useless behavior. Thus these claims are clearly distinguishable from those of persons who never made any attempt to be admitted to the union or to get work referrals from the union. Steamfitters, Local 638, 13 FEP Cases at 712.

The burden of demonstrating that a claimant who had discriminatorily been denied work referral wilfully contributed to a loss of interim earnings clearly lies with the

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49/ See also similar provision in United States v. Wood, Wire and Metal Lathers, Local 46, supra, 328 F.Supp. at 444.

50/ Any of his earnings from work acquired elsewhere would, of course, be deducted from back pay for that period.

unions. In any back pay determinations on these issues, any doubts should be resolved in favor of the claimant. E.g., Franks v. Bowman Transportation Co., supra, 424 U.S. at 772-73; Kaplan v. IATSE, supra, 525 F.2d at 1363; Baxter v. Savannah Sugar Refining Corp., supra, 495 F.2d at 445. See also Heinrich Motors, Inc., v. NLRB, 403 F.2d 145, 148 (2d Cir. 1968); NLRB v. Reynolds, 399 F.2d 668, 669 (6th Cir. 1968).

III. GCA WAS PROPERLY JOINED AS A PARTY DEFENDANT FOR PURPOSES OF RELIEF ONLY, UNDER RULE 19(a), F.R.Civ.P.

GCA, on behalf of its members, negotiates and enters into collective bargaining agreements with Locals 14, 15, 15A, 15C and 15D. These agreements are controlling on the members. The employer-members neither have separate agreements with the unions, nor do they even separately sign the agreements negotiated by GCA. In other words, the members of GCA have granted complete authority to GCA to establish with the unions uniform employment practices affecting their work, including those at issue in this case.[51/]

In light of GCA's central role in the collective bargaining process, it was properly joined as a party under Rule 19(a) for the purposes of relief and it (rather than its individual members) was the proper party for such purposes.

1. It was evident, from the outset of the case, that the referral practices of the union, including the provisions of the collective bargaining agreements which permitted employers to bypass the union hiring hall, were an important element in this case. As noted above, a central

51/ See also GCA's description of its participation in the formulation of the New York plan. GCA's Answer to Plaintiff's Interrogatories, No. 11 (Record, Doc.No.44, pp.4-5)

feature of the relief sought and obtained is that provision of the decree requiring all work to be obtained through the hiring hall. Since the collective bargaining agreements would thereby be affected, it was appropriate to join GCA as a party, for the purposes of relief only, under Rule 19(a), F.R.Civ.P., which provides in relevant part:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties....

While it may be that relief could have been granted without the presence of GCA,[52/] it is hardly in a position to complain that it was given an opportunity to present its views as to the desirability or undesirability of the exclusive hiring hall remedy.[53/]

Even if the government had not joined GCA in its complaint, the district court would have authority to join it

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52/ E.g., Kaplan v. IATSE, supra, 525 F.2d at 1361 n.4; United States v. Sheet Metal Workers, Local 36, supra, 416 F.2d at 132 n.16. See also United States v. Elevator Constructors, Local 5, supra.

53/ After trial, GCA submitted a proposed final order to the court, participated in the hearing on proposed relief, and submitted substantive comments to the court concerning the proposed relief.

if necessary for relief. United States v. Chesapeake & Ohio Railway Co., 471 F.2d 582, 592-93 (4th Cir. 1972), cert. denied, 411 U.S. 939 (1973). See also Bing v. Roadway Express, Inc., 485 F.2d 441, 445 (5th Cir. 1973).

2. Since what was at issue was the collective bargaining agreement over which GCA had been given complete authority, it, rather than the individual members, was the proper party for the purposes of relief. There was no attempt in this action to hold any employer liable for a substantive violation. The relief sought affected only matters within the authority delegated to GCA.

In Steamfitters, Local 638, 360 F.Supp. at 994-95, the court held that the contractors association was properly joined as a defendant where the relief would affect collective bargaining agreements.[54/] Similarly, courts have held that an International Union is a proper defendant, whether or not the locals are also joined, where the International bears the responsibility of negotiating collective bargaining agreements on behalf of the locals. E.g., United States v. Navajo Freight Lines, Inc., 525 F.2d 1318, 1321-22 (9th Cir. 1975); Sagers v. Yellow Freight System, Inc., 529 F.2d

54/ The contractors association in Steamfitters was joined by the government as a defendant for purposes of relief only, but as a defendant on the merits in the consolidated private action.

721, 737-38 (5th Cir. 1976). See also, Kaplan v. IATSE, supra, 525 F.2d at 1357, 1359.

GCA was fully competent to represent its members with respect to the issues here dealing with the collective bargaining agreements. Not only did it make its views known at the district court level (Statement, supra at 20), but it continues on this appeal actively to represent and protect the interests of its members. No employer has sought to intervene in this case to protect its individual interests. The joinder of GCA for the purposes of relief and the non-joinder of the employer-members was therefore proper.

IV. THE PROCEDURE PRECEDING ENTRY OF THE DECREE ADEQUATELY PROTECTED THE RIGHTS OF GCA.

A. The district court's order followed full development of the relevant facts in a sixteen-day trial on liability. Thereafter the court considered proposed orders submitted by the government, Locals 14 and 15 and GCA; the expression of their views of the proposed relief at an oral argument held on July 26, 1976; and extensive written comments on the proposed relief.[55/] (App.I 128-238; Record, Doc. Nos.

55/ Allied Building Metal Industries did not submit a proposed order, appear at the hearing on proposed relief, or submit comments on the proposed relief, although it, like all parties, had full knowledge of the proceedings.

113-116) GCA nevertheless contends that, since its interests were affected by the decree, it should have been accorded not only the right to be heard, but the right to a full evidentiary hearing, and that, in no event, should it have been placed under any affirmative obligations under the decree.[56/]

As GCA itself notes, there was no attempt in this case to hold GCA liable for the discriminatory acts proved. It was joined as a party only to give it the opportunity to present its views as to the propriety of the relief to be ordered as redress for the violations of Title VII proved at the trial. Cf. EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1095 (6th Cir. 1974). The need for the relief depends, not on any considerations which GCA could offer, but on the evidence of discrimination developed at the trial. Since here there had been extensive factual exploration of the manner in which certain practices operated to discriminate, the district court was in a position to make an informed judgment as to the need for changes in the referral system without

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56/ The unions make occasional reference to the absence of an evidentiary hearing but do not argue that they were entitled to an evidentiary hearing on relief.

undertaking a further repetitive evidentiary hearing. It properly gave the contractors associations the opportunity to express their views as to the manner in which the referral system should be reformed. The procedure adopted by the district court was fully adequate for that limited purpose.

This Court, in United States v. Wood, Wire and Metal Lathers, Local 46, supra, 471 F.2d at 415-16, held that due process did not require a full evidentiary hearing on issues of relief. There, the district court without an evidentiary hearing, entered an order requiring certain affirmative relief after an earlier consent decree, entered after eighteen months of discovery, had proved inadequate. This Court held that a formal fact-finding hearing on the reasonableness of the additional relief and the depressed condition of the industry was not required by due process because the union had been fully advised of the grounds of the relief and been given full opportunity to be heard by written submissions and oral argument. Here, the parties were similarly fully advised of the grounds for relief and given full opportunity to be heard.

It should also be noted that the decree provides for modification if, in practice, specific problems develop. Should any party affected by the order find the actual application of a provision of the order unworkable or onerous, it can recommend changes to the Administrator, and appeal to the district court if unsatisfied with the Administrator's decision. (App.II 245) Actual experience is a better teacher than an evidentiary hearing which adds little to the extensive information developed at trial and the considerations offered in favor of and in opposition to the decree.

B. GCA also claims that, since it was a party for the purpose of relief only and not for liability, the decree improperly imposes upon its members the affirmative obligation to use the hiring hall as ordered by the decree. These provisions however, merely make explicit what would have been implicit in any event — that the employers, who know of the decree can not, without risking contempt, undertake to violate it. See EEOC v. International Longshoremen's Ass'n., __F.2d__, 13 FEP Cases 971 (4th Cir. 1976), holding that

employers who were not named in the decree could properly be cited for contempt on allegations that they had acted in concert with a union, or alone, in frustrating the court's decree. If the direction for assignment of work only through the hiring hall is appropriate relief (as we have shown it was), then it is equally appropriate that parties, joined for the purpose of effectuating relief, be made aware of their obligations with respect to that relief.

CONCLUSION

For the foregoing reasons, the Commission respectfully urges this Court to affirm the judgment of the district court.

Respectfully submitted,

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December 6, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	:	
Plaintiff,	:	
-against-	:	ADMINISTRATOR'S DECISION
LOCAL 14, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 15, INTERNATIONAL UNION OF OPERATING ENGINEERS, et al.,	:	72 Civ. 2498 (CHT)
Defendants.	:	

This matter was heard on October 26, 1976 on the application of Mascali Construction Co., Inc., Zindler Construction Corp. and Copat Construction Corp. (hereinafter collectively referred to as the "Joint Venture Contractor"). Each company is a member of the General Contractors Association of New York City (Ex. 1).

On April 10, 1975 the Joint Venture Contractor executed a contract with The City of New York, Environmental Protection Administration, for construction work on the Red Hood Intercepting Sewer Project in Brooklyn, New York (Ex. 2), Work was commenced under the terms of the contract in May 1975 and continued until December 3, 1975 at which time all work, except maintenance type work, was suspended by the City

(Tr. 5-6). The shutdown did not occur through fault of the Joint Venture Contractor but because of massive unanticipated subsoil conditions (Tr. 8) Ex. 3).

At the time of the shutdown, the Joint Venture Contractor employed 22 operating engineers (including 2 trainees) (Ex. 4) and was in compliance with its contractual affirmative action obligations which required 25%-26% engineer category (Tr. 5, 37, Ex. 4).

The Joint Venture Contractor now requests that it be allowed to rehire its former employees when the Red Hook Sewer Project resumes in the near future. The claim is that (a) the Court Order does not contemplate use of the hiring hall procedures for the recall of employees working on the project at the time of shutdown if there is a resumption of that project by the same contractor, and (b) the contractor is in compliance with the intent and purpose of the Court Order to guarantee equal employment opportunity for minority group workmen.

The Order does not directly speak to this situation. I do not believe that paragraph 37(a) of the Order relating to transfers governs the situation where the union contractor shuts down its entire operation through no fault of its own for an extended period of time and resumes that work at a later date.

Here we have circumstances in which the contract was suspended because of unforseen subsoil conditions. Resumption of the work on the Red Hook project is imminent and is predicated on a Supplemental Agreement (Ex. 3) entered into between the original contracting parties. The recitations in the Supplemental Agreement make it clear that because of the unforseen subsurface conditions certain changes had to be made in the project which included for example, an alteration of the route for the sewer and a reduction in the size of the sewer pipe. These and other changes were part of the effort to minimize the effect of sewer excavation on adjacent structures. The changes increased the contract price but were predicated on Section 4b (Changed Conditions) in the original Agreement.

The kinds of changes provided in the Supplemental Agreement are not unlike "change orders" that routinely occur during the course of the performance of construction and other types of contracts. The difference here is that the occasion for the "change order" necessitated a suspension of work on the entire project until the proper changes (e.g. route) could be identified, studied and negotiated.

Under the limited and unusual circumstances of this case, it is my view that the Joint Venture Contractor may, consistent with the purpose and intent of the Court's

Order, recall for employment its employees that were on its payroll on the date the project was shutdown (Ex. 3). Nothing in this decision should be interpreted to be applicable to other situations beyond the specific facts in this case.

Since the hearing of this matter, the Mayor's Office of Contract Compliance/Construction has reviewed the minority requirements for the Red Hook Project and has apparently reached agreement with the Joint Venture Contractor, which if complied with, will meet the City and Federal minority work force requirements as to operating engineers. I have marked as Administrator's Exhibit 1 a letter dated October 29, 1976 reflecting such agreement that I received from Mr. McNamara of the Mayor's Office of Contract Compliance and have included it in this record.

It is clear, and indeed the Joint Venture Contractor concedes that under the terms of the Court Order any additional employees needed for the project must be obtained through the hiring hall procedures and of course, all other provisions of the Court's Order will be applicable.

Pursuant to paragraph 9(a) of the Court's Order and Judgment, the parties may appeal this decision to the District Court within ten (10) days.

Dated: New York, New York
November 5, 1976

J. Robert Brown
Administrator

CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing Brief for the United States Equal Employment Opportunity Commission as Appellee have been on this day hand-delivered to the following counsel of record:

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December 6, 1976